

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

INFINIA AT WILLMAR

Employer

and

MINNESOTA'S HEALTH CARE UNION,
SEIU LOCAL 113

Petitioner

Case 18-RC-17263

**HEARING OFFICER'S REPORT AND RECOMMENDATION ON
OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to a petition filed on April 27, 2004,¹ and the provisions of a Stipulated Election Agreement approved by the Regional Director for the Eighteenth Region on May 10, an election by secret ballot was conducted on June 8 among certain employees of the Employer.² The results of the election are set forth in the Tally of

¹ Unless otherwise indicated, all dates are in calendar year 2004.

² The collective bargaining unit agreed to by the parties and approved by the Regional Director is defined as follows:

All full-time, regular part-time, and casual/on-call non-professional employees employed by the Employer at its Willmar, Minnesota facility, including CNAs, CNA/TMAs, LPNs, Recreational Service assistants, Restorative Care/PT aides, Mental Health Worker I and II, and maintenance/janitor; excluding Health Trac employees, THERAPrime employees, RNs, office clericals, professional employees, salaried employees, managers, and guards and supervisors as defined in the Act as amended.

Ballots³ that issued on the day of the election. The challenged ballots were not determinative of the results of the election.

On June 15, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was served upon the Petitioner. Thereafter, on June 24, the Regional Director issued a Report on Objections, Order Directing Hearing and Notice of Hearing, and ordered that a hearing be conducted for the purpose of receiving evidence to resolve the issues raised by the objections to the election. In his June 24 Report and Order, the Regional Director directed the Hearing Officer to prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues.

Accordingly, on July 8, a hearing was held pursuant to said notice in Willmar, Minnesota, before the undersigned Hearing Officer. The Employer and Petitioner were represented at the hearing and had full opportunity to call, examine, and cross-examine witnesses, and to introduce evidence pertinent to the issues.

Upon the entire record in this case,⁴ and from my careful observation of the demeanor of the witnesses while testifying under oath, I make the following:⁵

³ Approximate number of eligible voters	53
Void ballots.....	0
Votes cast for Petitioner	24
Votes cast against participating labor organization	18
Number of valid votes counted	42
Number of challenged ballots	4
Number of valid votes counted plus challenged ballots.....	46

⁴ Permission was granted by the undersigned for the filing of briefs. The Employer and Petitioner subsequently filed briefs, which I have duly considered in formulating my recommendations.

⁵ In the resolution of all issues where credibility of oral testimony becomes a factor, I have carefully considered the demeanor and conduct of the witnesses, as well as their candor, their objectivity, their bias or lack thereof, and have carefully weighed the witnesses' understanding of the matter to which they

Findings of Fact and Recommendations

I. Facts

The Employer operates a nursing home in Willmar, Minnesota, one of three Infinia facilities in the State. Each facility is individually incorporated under the parent company, Infinia Healthcare, Inc. The administrator of the Willmar facility is Joshua Jensen, who had held that position for four and one-half years at the time of the hearing.

In early 2004, Petitioner (also called “the Union” herein) began an organizing campaign at the Willmar facility. In addition to soliciting union authorization cards from employees, organizers also solicited their signatures on a document called a “Recognition Petition.” According to SEIU Organizer Leah Lindeman, the purpose of the Recognition Petition was to attempt to gain voluntary recognition from the Employer without an election, by presenting it to the Employer in person.⁶ The Union also had a second use for the Recognition Petition. It cut and pasted employee signatures from the petition onto another document—a two-sided piece of campaign literature. This document, which I will refer to as “Campaign Flyer 1,” was photocopied onto purple paper (the organizing campaign’s signature color) and distributed to employees in the proposed bargaining unit in the April-May time frame. It was also posted in the employee break room. Thirty-three employee signatures appeared on one side, under the following text:

have testified, the plausibility, consistency and probability of their testimony, as well as whether parts of their testimony should be accepted when other parts are rejected.

⁶ In this case, this attempt was unsuccessful, as Jensen refused to accept the recognition petition when it was presented to him.

SOLIDARITY!

We, the undersigned workers at Infinia Willmar, hereby, demand recognition and representation for the purposes of collective bargaining and to negotiate and conclude all agreements respecting wages, hours and other conditions of employment from SEIU Local 113. We demand that you would respectfully honor our decision and refrain from any and all actions to persuade us otherwise, as this is our decision to make.⁷

The other side of the document is entitled “Stronger Together,” and contains “A message from your union organizing committee.” The text explains, *inter alia*, that since the Employer refused voluntary recognition, the Union planned to file for an NLRB election. At the bottom are the typed names of seven employees, ostensibly members of the employee organizing committee. Testimony at the hearing was undisputed that there had been no complaints from employees whose signatures had been cut and pasted onto this document from the recognition petition, about the use of their signatures in this manner. The record was not crystal clear as to whether employees had been told that their signatures would be used in the future on campaign literature like this, but I conclude they were not told. I conclude this because although she was asked this question several times, Organizer Lindeman was evasive in answering and did not clearly answer in the affirmative.

About a month prior to the election, Union organizers again solicited employee signatures, this time on a “Vote Yes” petition. This petition read:

⁷ The same language appears on the recognition petition, followed by employees’ signatures.

Stronger Together! Vote Union YES!

I'm committed to standing with my co-workers
to gain a voice at work.

I will be voting "UNION YES!" June 8th, 2004.

Below this heading were spaces for employee signatures and job titles, plus two additional pieces of information were sought: the time they planned to vote, and whether or not they needed a ride to the polls.⁸ Similar to the previous cutting and pasting of signatures from the recognition petition to Campaign Flyer 1, the Union cut and pasted employee signatures from the "Vote Yes" petition onto a second piece of campaign literature, to be referred to herein as "Campaign Flyer 2." Campaign Flyer 2, again printed on the Union's official purple paper, states "Vote Yes!" at the top, with the date, time and location of the election also appearing. Thirty-two (photocopied) employee signatures comprise the body of the flyer. There are also some tiny photos, the SEIU logo, and some phrases such as "For better staffing!" and "For Quality Resident Care!" appearing thereon. The reverse side of the flyer is blank.

⁸ In late May, after Administrator Jensen found out that the "Vote Yes" petition was being circulated, he posted a memo to employees on the message board stating:

Apparently, union supporters are trying to get people to sign up for a time to vote. WHY? They are attempting to pressure you with any means possible to vote them in. If the union and the union supporters were truly looking out for the best interests of the facility and the residents, why would they need the sneaky tactics, like pressuring you to vote at a certain time, or coming over to your house and sneaking a union rep. in with them? The answer is that they know they are not in your best interests, and all they want is your money. Again, the union did get voted in at Owatonna, but negotiations have not been scheduled yet. If they really had your best interests at heart, wouldn't the negotiators be knocking down the administrator's door demanding to negotiate immediately? They are not, the union is in there, so they know sooner or later they will get their money. Don't make the same mistake as Owatonna.

The mention of Owatonna in this memo is a reference to another Infinia home that was recently unionized.

Testimony at the hearing indicated that Campaign Flyer 2 was distributed to employees beginning the week prior to the election, although in a few cases employees did not see it until after the vote had taken place. Jensen testified that he first saw it five or six days before the election, when a staff person brought it in to show him. Although Jensen testified that “around 10” employees came to him to discuss their unhappiness with their signatures appearing on Campaign Flyer 2 without their consent, he listed only seven names of complaining employees. He described several of these employees as “very upset.”

At the hearing, several employees testified that they were unhappy about their signatures being used by the Union on campaign literature without their knowledge or consent.⁹ Five of these stated that their signatures were put on Campaign Flyer 2 by the Union without their permission. Nursing Assistant *Colleen Clarke* testified that employee T. Ramirez asked her to sign a document and to “put in what time I would like to vote for the union when we had the election.” She stated that Ramirez did not indicate that the document had any other significance. She stated that when she saw Campaign Flyer 2, it “just kind of threw me back because I didn’t give permission . . .”

On cross-examination, Clarke at first denied having signed an authorization card, until confronted with such card, which was signed by Clarke and bore the date April 25th. Clarke had other memory problems as she continued to testify, and when these were pointed out, in frustration she blurted, “I’ve got attention deficit, okay?” On re-direct, Clarke appeared to acknowledge that the petition Ramirez asked her to sign did contain the words “vote union yes.” She maintained, however, that Ramirez told her it

⁹ One of these, Raymond Kilby, testified that although he signed the vote yes petition, his name did not appear on Campaign Flyer 2.

was just to give the Union an idea of how many people planned to vote in the morning or afternoon. Clarke admitted that she knew she had a right to vote yes or no in the election. She stated that normally she does read what she signs, and in the case of the “Vote Yes” petition, she recalled seeing the words “Vote Union YES” at the top, but not reading the sentence that followed, “I am committed to standing with my co-workers to gain a voice at work. I will be voting union yes June 8th, 2004.”

I did not find Clarke’s testimony to be reliable, and I do not credit it insofar as she attempted to recall specific events or statements made to her. Her recollection was poor and frequently shown to be inaccurate. T. Ramirez, who also testified, recalled telling Clarke it was a vote yes petition. He related that Clarke had asked a lot of questions about what the petition meant, and he tried to explain it to her. He did not corroborate Clarke’s testimony that he told her it was just to indicate the time she planned to vote, although he admitted that that subject was discussed. As Ramirez’s recollection was much stronger and clearer, I credit his testimony over Clarke’s.

LPN *Pamela Sward* testified that Lindeman and a co-worker, LPN Mary Reitsma, came to her home to ask her to sign the vote yes petition. She stated that she was in a hurry that day and signed it quickly so she could get on her way. She stated that the whole thing had taken only five minutes. Sward stated, “I signed this for the time to come in and vote and I figured I vote—vote in the afternoon because I had to work in the afternoon and that’s the only reason I signed this.” Sward had previously signed an authorization card.

On cross-examination, Sward testified that she typically reads documents before signing them, and that she had read the top of the Vote Yes petition before signing it.

Nevertheless, Sward stated that it had upset her that her signature appeared on Campaign Flyer 2 without her “being aware that it was going to be put on there.” She testified, “To me, when you go in and vote you—it’s your right to vote yes or no and no one else’s business.” She concluded her testimony with a denial that Reitsma had told her this was a vote yes petition: “I was informed this was a sign-up for the time you were going to vote.” She was unable or unwilling to state who had said that to her.

I do not credit Sward’s assertion that she was not told that the Vote Yes petition was a vote yes petition. First, it simply makes no sense in light of her other testimony. Second, she added this assertion as an afterthought just as her time on the witness stand was wrapping up, and not during her longer and more complete recitation of the event on direct examination. Third, she stated that she read the petition before she signed it. Fourth, the testimony of Mary Reitsma was clear that she gave the same speech to Sward that she did to everyone else, including that “this is our ‘vote yes’ petition [that says] that you’re committed to standing with us and we know that you’re strong union, so we’d like you to stand with us and show us that you are by signing the ‘vote yes’ petition and then letting us know what time you’re going to vote, if you need a ride or not . . .” Lindeman corroborated Reitsma’s version of her speech to Sward.

LPN *Jeanne Hammer* testified that at the time she signed the Vote Yes petition, she was told “that we needed to sign-up the time to vote and also if people did not have rides they could arrange that.” She did not specify who told her this. She stated that she went to Jensen to complain when she discovered that her signature had been put on Campaign Flyer 2. She acknowledged having signed an authorization card, but refused to admit that at the time she signed it she supported the Union. She reluctantly

admitted that she had read the words, “Vote Union Yes” and the other printed text on the top of the Vote Yes petition before she signed it, but stated “This is a secret ballot. It doesn’t mean if I’m voting yes, no or maybe.”

Hammer was in a state of high dudgeon as she testified. She had a difficult time controlling her temper enough to answer the questions posed to her in a coherent manner. Her vexation stemmed from the photocopying of her signature onto Campaign Flyer 2 from the Vote Yes petition. There were certain points in her testimony where she became nearly incoherent. In all her ramblings, Hammer did not explain why the earlier use of her signature on Campaign Flyer 1 did not elicit the same irate response as its use on Campaign Flyer 2.

T. Ramirez recalled having solicited Hammer’s signature on the Vote Yes petition. He stated that he told her that the purpose of the petition was “showing everybody that, you know, you’re for the Union and you want to stick together and show everybody that we’re stronger together.” His clear and forthright testimony was much more convincing than Hammer’s, and I credit it over her assertion that she was told only that the petition would be used for designating what time she would vote and whether she needed a ride to the polls. It is clear from Ramirez’ testimony and Hammer’s admission that she read the Vote Yes petition before signing it, and that she knew that the purpose of the petition was to show employees’ solidarity with the Union effort.

Janitor *Bob Hay* testified that he was on his way out of the facility to dump some garbage bags when he encountered Nursing Assistant Deb Voit with the Vote Yes petition. She asked him if anyone had approached him about signing up to vote. He responded that union representatives had come to his house and talked to him a couple

of times. Voit handed him the Vote Yes petition, and according to Hay, “explained to me that the Union would like a list of all the people who were going to vote in the election, so I signed it.” Hay stated that Voit had not said anything else about the petition.

Several days before the election, when he first saw Campaign Flyer 2 with his signature photocopied on it, Hay attempted to call Voit for an explanation. He was unable to reach her, so he went to see Administrator Jensen. He stated that he offered to resign his position because he felt that the trust that other employees had in him had been compromised, as had his right to privacy. His testimony was to the effect that he had attempted to maintain neutrality on the union question, and that had been brought into question by the appearance of his name on Campaign Flyer 2. Jensen apparently persuaded him not to resign.

On cross-examination, Hay admitted that during a home visit prior to this, Organizer Lindeman had explained to him that he would be asked to sign a Vote Yes petition in the coming days, which was a way for union supporters to show their strength and support for the Union. He also admitted that at the time he signed the petition, he might not have read it very carefully. He recalled seeing other employees’ signatures on the document, but stated that he had not taken the time to review the document before signing. He stated that he knew at the time he signed that other employees would see his signature on the document.

Voit also testified about her encounter with Hay. She stated that she first inquired whether anyone had approached him about signing the “Vote Union Yes” petition, and asked if he was interested in signing it. She stated that she offered to let

him take it with him, because they were both in the midst of performing their duties, but that Hay indicated he wanted to sign it then.

I conclude from the testimony of these very credible witnesses that the purpose of signing the Vote Yes was not kept from Hay by either Voit or Lindeman, and that Hay knew (or should have known) what the purpose of the petition was. The testimony did not establish that Voit told Hay that the only purpose of signing it was to indicate who was going to vote. Both witnesses stated that when she approached him, Voit asked him if he wanted to sign the “Vote Yes” petition. It was thus incumbent upon Hay, if he had questions about what that meant, to read the petition before signing it, ask Voit questions about it, or otherwise to ascertain the import of placing his signature on that document before he did so.

Mental Health Worker *Gloria Baumann* testified that she did not recall who solicited her to sign the Vote Yes petition, nor the circumstances surrounding having signed it. She recalled having signed a union authorization card, but also did not remember the circumstances of that signing. She stated that she was displeased to see her name appear on Campaign Flyer 2, “something that I hadn’t signed.” She testified that the first time she actually saw the flyer was in a staff meeting, which she recalled as having taken place after the election.

T. Ramirez testified that it was he who asked Baumann to sign the Vote Yes petition. He stated, “I explained to her that it was a “vote yes” petition and – because I know at first she wasn’t really wanting to be part of the Union so I kind of gave her information that explained to her and kind of – then finally she’s like – “well sure. You know, I sign up. I understand your side.” And so she decided to sign up then. She said

what time she was coming and I said, “that’s great,” and that was pretty much it.” He was clear and specific in his recollection of having explained to Baumann that signing the petition “would show everyone that you were for the Union and – that fact that this shows us to be stronger.”

I conclude, as with the situation involving Bob Hay, that Baumann knew (or should have known) that what she was signing was a document that was an expression of pro-union support and solidarity. She never testified to the contrary, nor did she state that she was told the only purpose of signing was to indicate the time she planned to vote or whether she needed a ride to the polls.¹⁰

II. The Objections

- A. **Objection 1.** Petitioner coerced employees in the proposed bargaining unit to sign up to vote at designated times, implying that the Petitioner was conducting the election under its rules rather than the Rules of the National Labor Relations Board (“Board”) which is *per se* overreaching and coercion by Petitioner.
- B. **Objection 2.** Petitioner forged or otherwise converted signatures of members of the proposed bargaining unit and campaign material urging a yes vote for Petitioner, falsely implying that these individuals endorsed the union when in fact they did not. It appears that at least some of these signatures may have been taken or cut and pasted from the sign-up sheet referenced in number 1 above or from the initial petition for recognition filed by Petitioner herein.

III. Analysis

A. Objection 1

Regarding Objection 1, there was little evidence offered in support. Although the Employer attempted to make a case that employees were falsely told that signing the

¹⁰ Nursing assistant Ray Kilby also testified, stating that at the time he signed the Vote Yes petition, he explained to the solicitor, Deb Voit, that he was signing it only to indicate a time to vote and not as an indication of an intention to support or vote for the Union. After discussing the matter further with him, and at his request, the Union decided not to photocopy his signature on Campaign Flyer 2.

Vote Yes petition was only to indicate when they planned to vote and if they needed a ride to the polls, actual witness testimony on that point was unconvincing. I conclude that solicitors did tell employees that the document was a “Vote Union Yes” petition, oftentimes elaborating on that explanation by saying that it was a way for employees to stand together and indicate a show of strength in favor of the Union. There were no promises made or inducements offered in return for signing, and the solicitation was largely employee to employee contact. On the facts presented, I am unable to find that any coercion of employees took place.¹¹

As to the allegation that by its actions, Petitioner implied to employees that it was conducting the election under its rules rather than the Rules of the NLRB, I find no evidence of that. The Vote Yes petition by its terms was clearly asking employees to sign on to the principles of union solidarity, and not anything that could be confused with an official Board document. The solicitors were known to be members of the Union’s employee organizing committee. None of the representations made during solicitation indicated that the solicitors were acting on behalf or in lieu of the NLRB. Employer campaign literature underscored the fact that the election was going to be run by an agent from the NLRB and not by the Union. I therefore recommend that Employer’s Objection 1 be overruled.

B. Objection 2

Objection 2 presents a closer question. While I have concluded that employees soliciting signatures for the Vote Yes petition were honest and forthright about the meaning and purpose of that document, I also conclude that solicitors did not tell those

¹¹ Vote Yes petitions have been found not *per se* coercive. NLRB v. Media General Operations, Inc., 360 F.3d 434 (4th Cir. 2004).

whom they were soliciting that their signatures would be used for any other purpose in the future. Soon thereafter, the signatures appeared on a piece of campaign literature, put there by the Union without having notified the signers in advance. It is also clear that, with few exceptions, petition-signers were not offered the opportunity to approve or disapprove the use of their signatures on Campaign Flyer 2 before it was distributed. The question thus becomes whether that conduct on the part of the Union constituted a misrepresentation that necessitates setting aside the election.

In Midland National Life Insurance Co., 263 NLRB 127 (1982), the Board set forth the standard to be used in evaluating misrepresentations made by parties to an election. It held that it would no longer probe into the truth or falsity of parties' campaign statements and would not set aside an election on the basis of misleading campaign statements, except in cases of forgery that preclude employees from recognizing campaign propaganda for what it is. In other words, the Board will not set aside an election because of the substance of the representation, but may do so because of the deceptive manner in which it was made, a manner that renders employees unable to evaluate a forgery for what it is. U-Haul Co. of Nevada, Inc., 341 NLRB No. 26 (2004)

In this case, no forgery has been shown, at least in the technical sense of a party signing employees' names in their stead. It is undisputed that the signatures themselves, as placed on the Vote Yes petition, were true and authentic. When the Union took those signatures, cut and pasted them onto a piece of campaign literature, and distributed it as campaign propaganda, it gave rise to a legitimate question: did the alleged misconduct interfere with the free choice of a reasonable employee?

1. Contentions of the Parties

The Employer, while conceding the absence of forgery in the legal sense, argues that the Union's act of misappropriating employees' signatures caused other employees seeing these signatures to be influenced in their vote by what they saw as endorsements. The Employer contends that it is reasonable to assume that there were enough voters who were so influenced as to decide the outcome of the election. The vote was a close one. The Employer asserts that the Union's conduct was sufficiently deceptive to have affected the election results.

The Union argues that Campaign Flyer 2 was easily identifiable as Union campaign propaganda by the Union logo, Union slogans, the color, and the fact that it says, "Vote Yes!" at the top. As such, it is not objectionable because employees were able to evaluate it as campaign propaganda and understand that the message is simply one of encouragement by one party to vote for the Union. The Union contends that Midland protects the free speech rights of the parties to the electoral process, including its right to put out a partisan document such as Campaign Flyer 2. Further, the Union urges that the signers of the Vote Yes petition knew or should have known that others would see their signatures either on the petition itself or on campaign literature, because of the nature of that document and also because their signatures had been cut and pasted onto campaign literature in the past.

2. Applicable law

In Champaign Residential Services, Inc., 325 NLRB 687 (1998), the petitioning union circulated a flyer with 68 photocopied signatures of employees under a heading that stated, "We are winning! Join Us!" The signatures matched those of employees

who had signed the union's Vote Yes petitions. The Board found that it was clear from the face of the flyer that it emanated from the union, and that there were minimal misrepresentations in the gathering and compilation of signatures. As in the instant case, "employees who signed the petition knew or should have known that their signatures indicated their support for the Union and all but two knew or should have known that their signatures would be shared with other voters." The Board concluded that there was no evidence that the flyer involved misrepresentations so pervasive and deception so artful that employees were unable to separate truth from untruth so that their right to a free and fair election would be affected.¹²

In Gormac Custom Manufacturing Inc., 335 NLRB 1192 (2001), (a supplemental decision following a Sixth Circuit remand) employees signed a petition that stated, "I hereby authorize the United Steelworkers of America to represent me for the purpose of collective bargaining with my employer. This further authorizes the Union to send my name to the National Labor Relations Board and sign my name to union leaflets." Thereafter, the union created a leaflet using the 31 employee signatures from the petition. The leaflet contained large handwritten print at the top stating, "We're the Majority! We're Voting Yes!" The union allegedly circulated this campaign leaflet just prior to the election.

The union won the election 19-16 with 4 challenged ballots and 1 void ballot. As in the instant case, several employees were upset with the use of their signatures on campaign literature without their authorization. The Administrative Law Judge concluded, as I have concluded herein, that despite their testimony to the contrary, the

¹² This is the more rigorous standard articulated by the Sixth Circuit in Van Dorn Plastic Machinery Co. v. NLRB, 736 F.2d 343 (6th Cir. 1984).

employees were well aware of the purpose of the petition when they signed it, as it was specified on the document itself.

The ALJ applied the more stringent standard mandated by the Sixth Circuit, which holds that a new election is warranted in cases where no forgery can be proved, but where “the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.” Van Dorn Plastic Machinery Co. v. NLRB, 736 F.2d 343, 348 (6th Cir. 1984). In applying the five-factor test used by the Sixth Circuit in deciding this kind of case,¹³ the ALJ examined the misrepresentations allegedly made by the union. The first was promising employees that their signatures would be kept confidential and would be used only for the purpose of getting an election. The second misrepresentation was made to the electorate when the flyer was posted, stating that each of the signatories would vote yes. This misrepresentation was problematic in that it created a false sense of the extent of union support. Finally, in making his decision (which was adopted by the Board), the ALJ was mindful of the closeness of the vote.

The ALJ concluded that the employer had failed to meet its burden of demonstrating that the Union’s conduct interfered with employees’ exercise of free choice to such an extent that it materially affected the result of the election. He found that the employer failed to establish that the union’s leaflet actually affected employees who voted (or those who failed to vote). He also found that the language on the top of the petition implied to employees that by signing, they were committing, at least at that

¹³ (1) the timing of the misrepresentation; (2) whether the employer was aware of the situation and had an opportunity to respond; (3) the extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees “actually were affected” by the misrepresentation. Another factor to consider is the closeness of the election.

point in time, to an intention to vote for the union. Also implicit in that language was the employees' agreement that the union intended to use their names to help garner the support of other employees and thereby obtain recognition as the collective bargaining representative. Under these circumstances, the ALJ concluded that something more was necessary beyond the mere use of employees' signatures – such as a gross misrepresentation or a deliberately deceitful tactic – in order to sustain the objections and overturn the results of the election.

3. Conclusion

Applying the principles discussed above to the facts of the instant case, I conclude that the Employer has failed to meet its burden of proof to show that the Union's creation and distribution of Campaign Flyer 2 interfered with the exercise of employees' free choice in the election.¹⁴ I find that the "misrepresentation" in this case – photocopying employees' signatures from the Vote Yes petition onto a piece of campaign literature and distributing it – was perhaps a questionable tactic, but not so deceptive that it prevented voters from evaluating Campaign Flyer 2 as campaign propaganda put out by one of the parties to the election. While the Employer would have me believe that this misrepresentation led to a rise in the number of "yes" votes by a confused electorate, it did not present any evidence to that effect. In fact, one could easily conclude that the employees who testified as to their unhappiness in seeing their signatures used in this manner, and were at one time favorably disposed toward the Union, most assuredly voted no.

¹⁴ I note that it is not necessary to apply the Sixth Circuit's more stringent standard, and instead will apply the Midland National Life standard.

Employees who signed the Vote Yes petition could easily see from the large type that it was exhorting workers to “Vote Union YES!” If they read the small type, committing them by signing to stand with their co-workers and vote yes, this point was even more clear. It was also obvious that others had signed before them, and if blanks remained, that others would see their signatures when they were presented with the petition. No assurances were made by the solicitors that these signatures would remain confidential, and no witnesses testified that they believed their signatures would be kept in confidence. Certainly no one was told to disregard the language at the top of the petition. Thus, anyone agreeing to sign the petition tacitly agreed to be part of a larger movement trying to achieve unionization. It is just not possible, given this set of facts, to conclude that the Union’s actions in photocopying these signatures onto a “Vote Yes!” campaign flyer misrepresented signers’ actual intentions or mindset at the time they signed the petition. There are not two sentiments being expressed in these documents, there is only one, and that is, “we plan to vote for the Union on election day, and we want others we work with to know that.”¹⁵ As in Gormac, implicit in the language of the petition was the notion that by signing, the employees were agreeing that the Union intended to use their names to help garner the support of other employees.

The testimony reflected that the Employer addressed the creation and distribution of Campaign Flyer 2 at mandatory employee meetings held in advance of the vote. At these meetings, Administrator Jensen referred to the Union’s actions of cutting and pasting employees’ signatures as “illegal.” Also, the Employer’s own

¹⁵ Only Ray Kilby can be said to have expressed a contrary sentiment, when he told Deb Voit that by signing, he was only indicating when he planned to vote, and not that he was in favor of the Union. Accordingly, the Union did not put his signature on Campaign Flyer 2.

campaign propaganda reminded voters that if they did not want a union, they could mark the “no” box on the ballot, and that no one would know how they voted. I find that the Employer had an adequate opportunity to counteract the Union’s conduct prior to the vote. I also find that the Employer has not shown that the Union’s actions had any effect upon the employees’ exercise of free choice in the election.

CONCLUSIONS AND RECOMMENDATIONS

In view of the foregoing findings of fact and after carefully considering all of the evidence in the record, and based on a fair assessment of the credibility of the witnesses, I conclude that the Union’s having photocopied employee signatures from a Vote Yes petition onto a piece of campaign literature and distributing it, did not have a reasonable tendency to interfere with the employees’ freedom of choice in the election. I therefore recommend that the Employer’s objections 1 and 2 be overruled in their entirety, and that an appropriate Certification of Representative issue.¹⁶

Signed at Minneapolis, Minnesota, this 10th day of August, 2004.

/s/ Pamela W. Scott

Pamela W. Scott, Hearing Officer
National Labor Relations Board
Eighteenth Region
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¹⁶ As provided in Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, within 14 days from the date of issuance of this report, any party may file with the Board in Washington, D.C. an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director and a Statement of Service shall be made to the Board simultaneously therewith.